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No. 93-1906

In The

Supreme Court of the United States

October Term, 1993

THE TUXEDO UNION FREE SCHOOL DISTRICT, et al.,

Petitioners,

v.

BRIAN CULLEN,

Respondent.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF *AMICUS CURIAE* OF NEW YORK STATE SCHOOL BOARDS ASSOCIATION, INC. IN SUPPORT OF PETITION FOR WRIT OF *CERTIORARI*

JAY WORONA
(Counsel of Record)
SHARI GREENLEAF
NEW YORK STATE SCHOOL BOARDS ASSOCIATION
119 Washington Avenue
Albany, New York 12210
(518) 465-3474

LOUIS GRUMET
Executive Director

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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INTEREST OF THE *AMICUS*

This brief is filed with consent of all parties. Letters of consent are on file with the Clerk of this Court.

The New York State School Boards Association (hereinafter "NYSSBA") submits this *amicus curiae* brief in support of Petitioners' petition for Writ of *Certiorari*.

NYSSBA is a corporate instrumentality of the public school districts of the State of New York, and represents approximately seven hundred (700) or ninety-three (93) percent of such public school districts who are members

of this Association. Pursuant to section 1618 of the Education Law of the State of New York, NYSSBA has the responsibility of devising practical ways and means of attaining greater economy and efficiency in the administration of public school district affairs and projects.

NYSSBA has, in recent years, appeared as an *amicus curiae* in several state and federal judicial and administrative proceedings involving both the New York State and the nation's public schools. Included among those appearances have been: *Lamb's Chapel*, ___ U.S. ___, 113 S. Ct. 2141 (1993); *Cullen v. Fliegner*, 18 F.3d 96 (2nd Cir. 1994); *Mozert v. Hawkins County Bd. of Educ.*, 827 F.2d 1058 (6th Cir. 1987); *Smith v. Bd. of School Commissioners of Mobile County*, 827 F.2d 684 (11th Cir. 1987); *Winter v. Rhinebeck Cent. School Dist.*, 79 N.Y.2d 1 (N.Y. 1992); and *Derle v. North Bellmore Union Free School Dist.*, 77 N.Y.2d 483 (N.Y. 1991). Many such actions involved issues similar to those of the instant case including, but not limited to, statutory construction and constitutionality.

REASONS FOR GRANTING THE WRIT

Although *amicus* recognizes that this court is often reluctant to review a case involving the interpretation of a unique state law, the state laws involved in this case concerning anti-electioneering and tenured teacher discipline are similar to laws in other states. Thus, the decision of the court below sets a precedent that potentially will impact a number of states other than New York. The issue of the extent of the constitutional protection of

speech in the context of anti-electioneering statutes transcends school district elections and thus, is relevant to the administration of local and national elections in all states.

Additionally, the refusal of the lower court to abstain from intervening in a pending state administrative proceeding to discipline a school employee intrudes on the important state function of educating children. Since this court has previously recognized the importance of education as a state function, the decision below creates an untenable situation for schools in New York and across the nation. Particularly in light of the divergence in opinion between the court below and the Court of Appeals for the Third Circuit, states will be impaired in their ability to properly administer and supervise public schools by being precluded from appropriately managing their staffs.

The Court below, in failing to apply the *Younger* abstention doctrine permitted the respondent to circumvent New York State's comprehensive statutory scheme for the discipline of tenured teachers by local school boards. Intervention by federal courts, under the circumstances in this case, into the functioning of the tenured teacher disciplinary scheme would seriously hinder school boards in New York State and indeed in other states in their attempts to fulfill their obligation to provide students with a teaching staff which is competent, effective and cohesive.

STATEMENT OF FACTS

Amicus respectfully defers to the facts as described in the Writ for *Certiorari*. However, *amicus* would like to draw the Court's attention to several facts of particular significance to its arguments.

First, the petitioners commenced disciplinary charges against respondent, a tenured teacher employed by petitioner Tuxedo Union Free School District ("the District") on two occasions prior to the charges which were preferred in the instant case.

On February 15, 1990, the District filed charges against respondent alleging that respondent took students on an unauthorized field trip. Following a hearing before a statutorily convened administrative panel, the respondent was found guilty and was fined $1,250.

On February 13, 1992, the District filed a second set of charges against the respondent alleging that despite prior warnings, he ignited an aerosol spray in the presence of elementary students during school hours. Following a second administrative hearing, the respondent was found guilty and was suspended without pay for four months. Most recently, the Commissioner of Education determined that this penalty was insufficient and increased the penalty to a suspension without pay for one year. *Appeal of Board of Educ., Tuxedo Union Free School Dist.*, 33 Educ. Dep't Rep. ___ (Dec. No. 13171, May 5, 1994) (Appendix H to the Petition for Writ of *Certiorari*).

In the present case, on May 6, 1992, respondent was personally and repeatedly made aware by various officials of the District and by police officers of the Tuxedo

Police Department that New York Education Law §2031-a prohibits electioneering activities by any person within one hundred feet from the entrances of a building being used as a polling place during the hours that a school district election is being conducted. At this time, respondent was not asked to cease and desist from this activity but rather to engage in this activity beyond one hundred feet from the polling place. Indeed, respondent did not dispute the fact that at the time when he was electioneering, that he was within one hundred feet from the polling place. Respondent failed to demonstrate that any other person, in addition to himself, was engaged in electioneering within one hundred feet from the polling place.

At a statutorily authorized teacher disciplinary hearing, the respondent interposed, as a defense to the charges, the claim that his constitutional free speech rights were violated by the District's enforcement of the anti-electioneering statute. Following a denial of his constitutional defense by the administrative hearing panel, the lower federal district court found that the District had initiated and maintained the present disciplinary proceeding in bad faith and that, therefore, the bad faith exception to the federal *Younger* abstention doctrine applied. As a result, the district court issued an injunction against the further proceeding of the state administrative disciplinary action. The court below affirmed this determination.

ARGUMENT

I. The lower court erred in its finding that the bad faith exception to the *Younger* abstention doctrine applied thereby determining that federal court intervention is warranted when a previously disciplined employee maintains a constitutional claim in the context of a pending administrative disciplinary proceeding.

In its landmark decision in *Younger v. Harris*, 401 U.S. 37 (1971), this Court held that federal courts must abstain from intervening in pending state criminal proceedings unless an injunction is necessary to prevent great and immediate irreparable injury. The *Younger* doctrine has been extended to apply to pending civil and administrative proceedings in which the state has a substantial interest. *Ohio Civil Rights Commission v. Dayton Christian Schools*, 477 U.S. 619 (1986); *Middlesex County Ethics Committee v. Garden State Bar Association*, 457 U.S. 423 (1982); *Christ the King Regional High School v. Culvert*, 815 F.2d 219 (2d Cir. 1987), *cert. denied*, 484 U.S. 830 (1987); *Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008 (3rd Cir. 1981).

The *Younger* doctrine is founded upon:

> the notion of 'comity,' that is, a proper respect for state functions, a recognition of the fact that the entire country is made up of a Union of separate state governments, and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.

Younger, 401 U.S. at 44.

Notwithstanding the fact that "the normal thing to do when federal courts are asked to enjoin pending proceedings in state courts is not to issue such injunctions," *Younger*, 401 U.S. at 45, this Court has recognized several narrow exceptions to the *Younger* abstention doctrine. Thus, federal courts need not abstain from intervening in state proceedings when the state prosecution either: applies a patently unconstitutional statute; when the proceeding is brought by state officials in bad faith or for purposes of harassment; or when other extraordinary circumstances exist in which irreparable harm can be shown. *Younger*, 401 U.S. at 48-49; *Kugler v. Helfant*, 421 U.S. 117 (1975). *See also, Gibson v. Berryhill*, 411 U.S. 564 (1973); *Perez v. Ledesma*, 401 U.S. 82 (1971).

In the present case, the courts below found that the bad faith exception to the *Younger* doctrine applied and thus enjoined the District from proceeding forward in the pending tenured teacher disciplinary action. The courts below did not determine that the other two above noted exceptions to the *Younger* doctrine applied.

The lower court's decision to intervene was founded on a determination that the District applied the state statutory scheme for tenured teacher discipline in bad faith against the respondent in that the respondent was "someone with whom the School District 'had a past history of personal conflict' " and therefore enforced the electioneering prohibition "exclusively on the activities of [the respondent]." *Cullen v. Fliegner*, 18 F.3d 96, 102 (2nd Cir. 1994) (Appendix A to the Petition for Writ of *Certiorari*).

The court below apparently failed to appreciate that federal intervention was unnecessary because the New York State statutory scheme fully protects the due process rights of teachers like the respondent because the disciplinary proceedings under the statutory scheme provide a forum capable of adjudicating teachers' constitutional claims. Furthermore, the court's determination that the District acted in bad faith merely because the disciplinary charges enforcing the anti-electioneering statute had been preceded by prior disciplinary actions against the respondent implies that federal intervention will always be necessary to enjoin the application of the statutory scheme when districts proceed against teachers on more than one occasion.

Amicus respectfully submits that the Court below improperly found that the bad faith exception to the *Younger* abstention doctrine applied because the statutory scheme and its application in the present case do not evidence bad faith as articulated in previous decisions of this Court. *See, Younger*, 401 U.S. at 48-49; *Kugler*, 421 U.S. at 124.

The statutory scheme contained in New York's Education Law, and the implementing regulations adopted by the New York State Commissioner of Education, provides an administrative procedure for disciplining tenured teachers administered by the New York State Education Department which provides adequate due process protection of the rights of teachers charged with misconduct. *Kelly v. Board of Educ.*, 435 F. Supp. 904 (W.D.N.Y. 1977); *Belmont Cent. School Dist. v. Gootnick*, 49 N.Y.2d 683 (N.Y. 1980); N.Y. Educ. Law §§3012, 3020-a; 8 N.Y.C.R.R. Part 82.

The statutory scheme adopted in New York provides teachers with: notice of the charges filed against them; an opportunity for a hearing before an independent three member panel (one of whom is selected by the teacher); the right to, but no obligation to, testify in his or her own behalf; the right to subpoena witnesses and cross-examine witnesses called by the school district; and the right to counsel. Educ. Law §3020-a(2), (3). All testimony at 3020-a disciplinary hearings must be taken under oath, and stenographic transcripts of the proceedings are kept and sent to the teacher at the expense of the Commissioner of Education. Educ. Law §3020-a(3)(c).

Although a tenured teacher may be suspended pending the outcome of the disciplinary hearing, **the teacher must be paid his or her full salary during any such suspension**. *Jerry v. Board of Educ., Syracuse City School Dist.*, 35 N.Y.2d 534 (N.Y. 1974). The employing school board must prove the charges of misconduct and the district must implement the determinations of the 3020-a hearing panel with respect to the teacher's guilt or innocence on the charges and the appropriate penalty imposed upon the teacher. Tenured teachers in New York enjoy the right to appeal an adverse decision of the 3020-a hearing panel to either the Commissioner of Education or to the local County Supreme Court. Educ. Law §3020-a(5).

As set forth above, the comprehensive statutory scheme adopted in New York ensures that the state administrative proceedings to discipline tenured teachers more than adequately provide a full and fair opportunity for teachers to interpose claims of constitutional rights in defense of 3020-a charges and authorizes hearing panels,

the Commissioner of Education and the New York State courts to adjudicate such constitutional claims.

This Court has found in similar contexts that other state administrative disciplinary proceedings like that in New York State are entitled to deference by federal courts. *See, Middlesex*, 457 U.S. 423. Likewise, the Court of Appeals for the Third Circuit has ruled that a similar tenured teacher discipline statutory scheme adopted by New Jersey involved an important state interest of fulfilling its commitment to provide public education and was adequate for purposes of resolving constitutional claims raised by teachers in the context of an administrative disciplinary action. *Williams*, 662 F.2d 1008. Thus, the Third Circuit ruled that the *Younger* abstention doctrine precluded the lower federal court from enjoining the pending teacher disciplinary action notwithstanding the teacher's claim of a violation of her First Amendment right to free speech. *Id.*

In addition to whether the administrative proceeding provides an opportunity to interpose constitutional defenses, as noted above, the court below also found that the District had acted in bad faith because it selectively enforced the anti-electioneering statute exclusively against the respondent. In the criminal context, selective enforcement in the prosecution of criminal charges has been sustained as evidence of bad faith warranting federal intervention only when the criminal defendant demonstrates the criminal charges have not been commenced against other similarly situated individuals while he has been singled out for prosecution **and** the state's prosecution has been invidious or in bad faith. *Gersten v. Rundle*, 833 F. Supp. 906 (S.D.Fla. 1993), *quoting, University Club v.*

City of New York, 655 F. Supp. 1323, 1328 (S.D.N.Y. 1987); *Schuler v. City of Chambersburg*, 641 F. Supp. 657 (M.D.Pa. 1986).

In this case, the respondent did not introduce evidence that any other similarly situated individuals were electioneering within 100 feet of the entrance to the polling place and thus, failed to demonstrate that he was singled out for prosecution by the school district.

As noted above, the lower court was also concerned with whether bad faith was evidenced by the ability under the statutory scheme of the District to bring multiple disciplinary actions against the respondent. With respect to the filing of multiple charges, requests for federal injunctions against pending criminal prosecutions have been denied when the criminal defendant claimed bad faith merely on the basis of his being prosecuted on more than one occasion in the absence of other indicia of bad faith. *Suggs v. Brannon*, 804 F.2d 274 (4th Cir. 1986); *United Books, Inc. v. Conte*, 739 F.2d 30 (1st Cir. 1984).

While it is certainly true that the statutory scheme adopted in New York does not prohibit school districts from filing more than one set of charges against a single teacher over the course of time, the mere filing of disciplinary charges on multiple occasions arising out of different instances of improper conduct should not be seen as evidencing arbitrary and discriminatory enforcement. *See*, Point II, below.

In this case, it should be pointed out that both prior 3020-a disciplinary charges brought by the District were substantiated by determinations of guilt by the 3020-a hearing panels. Indeed, the Commissioner of Education

recently upheld the 3020-a hearing panel's determination of guilt on the second set of charges and further increased the penalty imposed by the panel of a four month suspension without pay to a one year suspension without pay.

This Court has found in the criminal context that a mere allegation that a state prosecutor had become "personally involved" in a criminal defendant's case is insufficient to demonstrate bad faith, *Kugler*, 421 U.S. at 126, n. 6, and *amicus* respectfully submits that a "past history of personal conflict," *Cullen*, 18 F.3d at 104, between an employing school district and a tenured teacher is likewise insufficient by itself to demonstrate bad faith.

Indeed, the effect of the decision of the Court below would be that the simple filing of multiple disciplinary charges against a tenured teacher by a school district would be construed as an arbitrary and discriminatory manner of pursuing employment discipline by the district. Such a holding will effectively preclude school districts from carrying out their responsibilities to discipline teachers and involve federal courts in a function which this Court has previously held extreme deference should be afforded them.

The court below accepted the assertions of the respondent that the enforcement of New York Education Law §2031-a, an anti-electioneering statute, violated his constitutionally protected free speech rights.

Amicus respectfully asserts that federal intervention was not warranted in the present case because the respondent's free speech claims were specious. As set forth in the Statement of Facts, the respondent was never asked to cease and desist from engaging in his federally

protected free speech rights. Rather, he was simply asked to move beyond the 100 foot anti-electioneering zone to engage in his activities. As such, the restriction placed on his speech was, at most, a permissible time, place and manner restriction which did not violate his constitutional rights.

Even if the respondent's first amendment rights had somehow been implicated by the actions of the District, he failed to demonstrate that the New York State statutory scheme for disciplining tenured teachers is incapable of fully and fairly adjudicating such constitutional claims or that the process itself is constitutionally suspect.

Amicus respectfully submits that a plain reading of the contested anti-electioneering statute demonstrates that the primary and paramount purpose of the statute is to further the state's compelling interest in ensuring the integrity of the electoral process in school district elections. Based upon the very clear public policy upon which this statute is based, its enforcement cannot be seen as unconstitutionally infringing upon the free speech rights of any individual since individuals may indeed exercise their free speech rights in places outside of the anti-electioneering zone.

Indeed, this Court in *Burson v. Freeman*, ___ U.S. ___, 112 S.Ct. 1846 (1992), recently recognized as much when it upheld the constitutionality of an almost identical anti-electioneering provision from the State of Tennessee.

In *Burson*, the State of Tennessee had adopted a provision of law, similar to New York Education Law §2031-a, which prohibited electioneering activities within one hundred feet of a building being used as a polling place.

A candidate for public office challenged the Tennessee Law asserting that it violated her right to free speech under the First Amendment to the United States Constitution. In rejecting this challenge, this Court found that the state had a compelling interest in preserving the integrity of the voting process by taking measures to prevent voter intimidation and election fraud.

In upholding the Tennessee statute, this Court specifically took notice of the first anti-electioneering law in New York State, which was a precursor to Education Law §2031-a(2). This Court specifically referred to a historical commentary describing the purpose of the anti-electioneering law which stated that:

> In earlier times [New York's] polling places were frequently, to quote the litany, 'scenes of battle, murder, and sudden death.' This also has come to an end, and until night-fall, when the jubilation begins, [New York's] election days are now as peaceful as our Sabbaths.
>
> The new legislation has also rendered impossible the old methods of frank, hardy, straightforward and shameless bribery of voters at the polls.

Burson, 112 S.Ct. at 1854.

The public purpose served by the enactment and enforcement of Education Law §2031-a is to preserve the integrity of the electoral process. The placement of markers delineating the one hundred foot anti-electioneering zone required by §2031-a(1) is only a **means** of providing the public with notice of the overall prohibition which is the primary purpose of the law. As the Commissioner of Education has stated in construing

§2031-a, "every effort should be made . . . to ensure that [electioneering] does not occur." *Appeal of Chaplin*, 29 Educ. Dep't Rep. 388, 390 (1990).

Amicus respectfully submits that a plain reading of §2031-a in its entirety demonstrates that the placement of the markers is not a condition precedent to the general prohibition against electioneering because in adopting §2031-a the Legislature set forth both requirements separate from each other.

As a result of the respondent's clear knowledge that he was within the anti-electioneering zone and the fact that the posting of distance markers is not a condition precedent to the enforcement of the statute, the court below erred in determining that respondent's free speech rights were violated.

II. Public policy considerations compel federal courts to afford great deference to states in administering disciplinary proceedings against tenured teachers.

Well-established precedents from both state and federal courts in the nation have established that local autonomy in the management of school district affairs is essential to the operation of public schools. In this regard, this Court has stated, "No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process. . . . " *Milliken v. Bradley*, 418 U.S. 717, 741 (1974). *See also Brown v. Board of Educ.*, 347 U.S. 205, 213 (1972); *Hazelwood School Dist. v. Kuhlmeier*, 484

U.S. 260, 267 (1988). Thus, courts have found that "[e]ssential to the performance of this critically important function, moreover, is a professional and competent body of teachers capable of meeting high standards of conduct." *Williams v. Red Bank Bd. of Educ.*, 662 F.2d 1008, 1017 (3rd Cir. 1981).

New York State, like a number of states in the nation, has established a comprehensive statutory scheme which provides that a teacher who fails to live up to the required standards may be disciplined or even discharged. *See*, Point I above. Clearly this is not a state statutory scheme regarding employee discipline under which federal constitutional claims raised by employees are not capable of being fairly and fully adjudicated within the context of such disciplinary actions which would warrant federal intervention into the pendency of such proceedings. *See, Barry v. Barchi*, 443 U.S. 55 (1979). However, as is set forth more fully above in Point I, the New York State statutory scheme provides tenured teachers a more than adequate opportunity to fairly and fully adjudicate their constitutional claims.

Amicus respectfully asserts that if the decision of the Court below is permitted to stand, school districts within the jurisdiction of the Second Circuit, and other jurisdictions which adopt the same analysis, will be placed in the position of being precluded from fulfilling their commitment to provide students with a teaching staff which is competent, effective and cohesive. The essential effect of the decision below is that any tenured teacher who faces disciplinary charges arising out of alleged acts of misconduct would simply need to raise constitutional objections as a defense in order to have a federal court enjoin the

proceeding and preclude the employing school district from meeting its statutory obligation to assure an effective teaching staff.

Furthermore, as set forth above, the bringing of multiple charges on the part of employing school districts against tenured teachers should not be construed as evidencing bad faith but rather, should be construed as a demonstration of the fact that such districts may be attempting to properly maintain a teaching staff which is subordinate to authority and managed properly. The expansion of the bad faith exception to the *Younger* abstention doctrine by the court below is inconsistent with the jurisprudential standards which this Court has established regarding the role of federal courts in ongoing state proceedings.

CONCLUSION

In light of the grave implications which the decision below has on the future ability of school districts to properly manage their teaching staffs, *amicus* respectfully urges this Court to grant *certiorari* in this case and to return the appropriate level of federal deference to the states and their school districts in pending state teacher disciplinary proceedings.

Respectfully submitted,

JAY WORONA
(Counsel of Record)
SHARI GREENLEAF
NEW YORK STATE SCHOOL BOARDS ASSOCIATION
119 Washington Avenue
Albany, New York 12210
(518) 465-3474

LOUIS GRUBIET
Executive Director

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